

(i)

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1969

**No. 71**

**DAVID EARL GUTKNECHT,**

*Petitioner*

v.

**UNITED STATES OF AMERICA**

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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## RELEVANT DOCKET ENTRIES

3/1/68 Indictment Filed

3/11/68 Filed defendant's motion to make more definite and certain or to quash indictment.

4/9/68 Filed Order (Neville-Judge) dated 4-8-68 denying defendant's motion to quash, etc.

4/16/68 Entered arraignment and plea of not guilty (Devitt, J.)

4/18/68 Filed waiver of jury trial with court's approval and parties' signatures.  
Entered record of trial-Devitt, Judge

4/19/68 Entered record of further trial.  
Parties rest.

5/10/68 Filed Memorandum Decision and Findings of Fact dated 5-9-68 (Devitt - Judge) finding defendant guilty of crime charged in the indictment.

7/15/68 Sentence is imposed. 4 years imprisonment.

7/25/68 Filed Notice of Appeal.

[Filed March 1, 1968]

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

UNITED STATES OF AMERICA

v

4-68 CRIM 22

## INDICTMENT

(50 App. U.S.C. 462)

DAVID EARL GUTKNECHT

### The United States Grand Jury Charges:

That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota,

DAVID EARL GUTKNECHT

willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462.

A TRUE BILL

/s/ [illegible]  
United States Attorney

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

[Caption omitted in printing]

**ORDER**

The above matter came on for hearing before the undersigned, a judge of the above court, on March 28, 1968, on the motion of defendant for an order quashing the indictment heretofore returned against defendant or in the alternative requiring the United States to make the indictment more definite and certain. Chester A. Bruvold, Esq., 404 WCCO Radio Building, Minneapolis, Minnesota, appeared for defendant in support of said motion and Patrick J. Foley by J. Earl Cudd, Esq., appeared for the United States in opposition thereto. The court has heard the arguments of counsel, has examined the indictment, and on the basis thereof and on all the files, records and proceedings herein,

IT IS ORDERED That the motion of defendant be, and the same hereby is, denied.

It was stipulated into the record in open court by both counsel that the case would be transferred after arraignment and plea to the Third Division of this court for trial. It is so ordered and the clerk of this court is directed to place the case on the April, 1968 Third Division Criminal Calendar for trial.

/s/ Philip Neville  
United States District Judge

DATED: April 8, 1968.

## MEMORANDUM

Defendant is charged by grand jury indictment with having refused to serve in the armed forces of the United States. More specifically, the indictment in these terms charges in one count that he:

"willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462."

Defendant moves the court for an order quashing the indictment herein on the grounds that it fails to state any charge, is contradictory, combines two offenses in one count and is ambiguous.

Rule 8(a) of the Federal Rules of Criminal Procedure provides as follows:

"**Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

If in fact the above indictment charges two offenses, they are not set forth in separate counts as Rule 8(a) requires. Defendant's counsel agreed in oral argument before the court, however, that if the indictment had been in two counts, his claimed grievance would disappear.

Rule 14 of the Federal Rules of Criminal Procedure provides in part as follows:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in

an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The prejudice claimed by defendant is his alleged inability to know what charge he must meet at trial.

Defendant has devoted his argument to, and has cited a number of cases bearing on, the question of type of proof available to him when and if he stands trial on this indictment. He states failure and neglect to "submit to" gives greater latitude and a wider scope in proof than does failure and neglect to "report for". For purposes of the pending motion this consideration seems immaterial, though the court does not at this time pass upon and expressly reserves to the trial judge the question of type and quantum of proof available to defendant at the trial. In reality the only issue before the court on the present motion is whether the allegation is duplicitous; that is, are two different offenses alleged in one count to the prejudice of defendant, namely:

1. failure to report for induction
2. failure to submit to induction.

On this issue the court rules against defendant

50 App., United States Code, Section 462 embodies the concept that one who "knowingly fails, neglects or refuses to perform any duty required of him under . . . directions made pursuant to this title . . ." is guilty of an offense. The offense is failure to perform a directed duty. The indictment alleges that defendant failed and neglected "to perform a duty required of him". Under Section 462 this is the offense. This is the cause of his indictment. Section 462 does not contain within it either of the terms "report for" or "submit to". The indictment charges that having received a direction in the form of an order from his selective service board, he owed a duty to comply with it. This states an offense. This is sufficient to uphold the indictment.

The fact that the indictment goes forward to allege two different ways in which it is claimed he failed to perform

this duty does not alter this ruling. It could be alleged that he failed to perform a direction of the selective service board in several different ways. His charged offense, however, is failure to perform the duty required; and each of the ways in which he allegedly failed to do so is not per se a separate crime nor need it be a separate count in an indictment.

Defendant cites to the court *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed 567 (1946). A quote from that case accords with what has hereinabove been said: (emphasis added)

"By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure *to perform any duty required* of a registrant by the Act or the rules or regulations made under it. *An order to report for induction is such a duty*; and it includes the duty to submit to induction. *Billings v. Truesdell*, *supra*, 321 U.S. at page 557, 64 S. Ct. at page 746, 88 L.Ed. 917. Sec. 11 confers jurisdiction on the district courts to try one charged with such offense. But § 11 is silent when it comes to the defenses, if any, which may be interposed."

The fact that section 11 is silent when it comes to the defenses available to a defendant is not grounds for attacking the wording and validity of an indictment. Further, following the philosophy of Rule 14 of the Federal Rules above quoted, it is difficult to see how this ruling in any way prejudices defendant. He will be accorded the broader proof rights at the trial, if a difference there be, so long as both "report for" and "submit to" remain a part of the indictment, as this court now rules by its order that they shall.

What has heretofore been said disposes of defendant's motion to make more definite and certain. The court therefore denies defendant's motion.

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## EXCERPTS FROM TRANSCRIPT

[9]

\* \* \*

MR. CUDD: Your Honor, the Government will waive its opening statement since I believe in the discussion prior to our convening here I have stated to the Court what I believe the issues are, and I think it will shorten the time. I will call our first witness, Bernard Scheer.

Whereupon,

BERNARD A. SCHEER,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Government's Exhibit 1 marked for identification.)

BY MR. CUDD:

Q. Where do you live, Mr. Scheer? [10] A. At Gaylord, Minnesota.

Q. And what is your business or occupation? A. I am the county veteran service officer and also the Selective Service clerk for Sibley County.

Q. What's the local Board number there? A. 115.

Q. I will show you what has previously been identified as Government's Exhibit 1 and ask you if you recognize that? A. Yes, I do.

Q. And that's a Selective Service file pertaining to whom? A. David Earl Gutnecht.

Q. And are the records—strike that. Is that file and the entries thereunder prepared by you? A. Could I look at this?

Q. Sure. A. Yes, it is.

Q. And do you make the entries in that file pursuant to the Selective Service regulations? A. Yes, I do.

Q. At or about the time that the occurrences indicated therein take place, is that correct? A. Yes.

MR. CUDD: At this time then, Your [11] Honor, we will offer Government's Exhibit Number 1 for identification

into evidence. The Government has previously furnished Mr. Bruvold a Xerox copy.

(Government's Exhibit 1 offered in evidence.)

MR. BRUVOLD: May I make some inquiries, Your Honor?

THE COURT: Sure.

MR. BRUVOLD: Referring to Government Exhibit 1, there are certain numbered circled numbers in the upper right-hand corner, did you place those on there?

THE WITNESS: Yes.

MR. BRUVOLD: They are consecutive and they are used to identify the documents as they were placed in the file?

THE WITNESS: They were when I mailed them in, yes.

MR. BRUVOLD: When you put them in?

THE WITNESS: Yes.

MR. BRUVOLD: You put those numbers on before the file left your office?

THE WITNESS: Right.

MR. BRUVOLD: There are also some [12] other numbers in the lower corners, did you put those on?

THE WITNESS: No. I did not.

MR. BRUVOLD: You did not, But your numbering system is the number of the document in the circled number in the upper right-hand corner?

THE WITNESS: Yes.

MR. BRUVOLD: If your file is complete they should start with number one on those and run through, it would appear number 30 is the last one here?

THE WITNESS: I don't recall which is the last one, but I presume that would be the last one.

MR. BRUVOLD: You presume that would be the last one, number 30?

THE WITNESS: If they are in correct order.

MR. BRUVOLD: And if these papers were out of order in the file you could put them back in the same order by those numbers?

THE WITNESS: Yes, sir.

MR. BRUVOLD: And that is the number and the indication of the rotation of which these papers came into your file down there in Sibley County?

[13] THE WITNESS: Yes. According to the date.

MR. BRUVOLD: According to the date. And on the back of number one there is a certain listing, are you familiar with that listing?

MR. CUDD: Your Honor, I object to this.

MR. BRUVOLD: I just wanted to find out one item on this. Are you familiar with that item one?

THE COURT: Did you finish your objection?

MR. CUDD: Yes, Your Honor, I did. I wanted to object on the grounds that this question does not go to foundation, to the exhibit which, as I understand it, is counsel's purpose in examining at this time.

MR. BRUVOLD: This goes to the question of foundation.

THE COURT: You may answer.

THE WITNESS: What?

MR. BRUVOLD: Is that a listing of dates and events?

THE WITNESS: Yes, it is.

MR. BRUVOLD: And was that listing [14] made by you as part of your duties?

THE WITNESS: As far as I know it was. I am sure it was. I did it myself other than this one probably isn't my writing, I don't think, but I think the girl that works for me occasionally wrote that in for me. I had her write it in.

MR. BRUVOLD: You had a girl that works for you?

THE WITNESS: Well, occasionally she does, and she helps me with my other work, my veterans work and also helps with this.

MR. BRUVOLD: Then of your own knowledge you would say that that listing on that sheet there from your own knowledge is correct?

THE WITNESS: Yes, sir.

MR. BRUVOLD: We have no objections, Your Honor.

THE COURT: Exhibit 1 may be received.

(Government Exhibit 1 received in evidence.)

BY MR. CUDD:

Q. Now, Mr. Scheer, referring you to Government Exhibit 1, would you tell the Court on what date—strike that [15] question. From an examination of Government's Exhibit 1, can you tell me whether an order to report for induction was issued for David Gutnecht? A. Yes, it was.

Q. And on what date was that order issued? A. I don't recall offhand, I mean the date, myself. It would be in the file here.

Q. Can you recall what date the order required Mr. Gutnecht to appear? A. No. I don't recall the date. I mean I just don't.

Q. Well, would you examine the file and see if you can determine that? A. What day he was supposed to appear for induction?

Q. Yes. The date the order required him to appear and also the day the order was issued, please? A. He was ordered to appear on January 24, 1968.

Q. And what date was it, was that order to report for induction mailed? A. On December 26, 1967.

Q. And on January 24, 1968, did he appear at the Selective Service Board in Gaylord, Minnesota? A. Yes, he did.

Q. And from there what happened to him if you know? A. He joined the rest of the group and got on the bus [16] and left for the Federal Building in Minneapolis.

Q. Do you know Mr. Gutnecht, Mr. Scheer? A. I know who he is. I don't know him otherwise.

Q. Do you see him in the courtroom today? A. Yes.

Q. And would you indicate, please. A. Right there.

MR. CUDD: May the record show, Your Honor, that the witness has indicated the defendant David Gutnecht. Any objection, counsel, for the record so showing?

MR. BRUVOLD: There will be no objection as to identification that the David Gutnecht mentioned in the Selective Service file, Government Exhibit No. 1, is the defendant in this action.

BY MR. CUDD:

Q. Now, Mr. Scheer, the order to report for induction to which you just referred, that was the document that contains the number 25 in this upper right-hand corner, is that correct? A. Right.

MR. CUDD: I have no further questions, Your Honor.

\* \* \*

[21] Whereupon,

BILLY D. O'NEIL,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUDD:

Q. Sergeant, would you state your name, rank and serial number for the record, please? A. Sir, my name is Billy D. O'Neil, rank is Sergeant First Class, and service number is RA17377458.

THE COURT: Again, please, your service number again?

THE WITNESS: Yes, sir, RA17377458.

BY MR. CUDD:

Q. What is your present duty station? A. Sir, my present duty station is in Minneapolis, Minnesota.

Q. And in what specific branch of the armed forces? A. Sir, I am a non-commissioned officer in charge of the processing section at the old Federal Office Building.

Q. That's the armed forces induction station, is that correct? A. Yes, sir. That is correct.

[22] Q. And that's the place where selectees for military service are given physical examinations and processed for induction, is that correct? A. Yes, sir. That is correct.

Q. Now, were you on duty on January 24, 1968? A. Yes, sir. I was on duty.

Q. And did you have occasion to have a conversation with Mr. David Gutnecht? A. Yes, sir.

Q. And do you see Mr. Gutnecht in the courtroom today? A. Yes, sir, I do.

Q. And would you indicate, please? A. (The witness complies.)

MR. CUDD: Your Honor, may the record show that the witness indicated the defendant David Gutnecht?

THE COURT: Absent objection it may.

MR. BRUVOLD: We have no objection.

THE COURT: The second man sitting there, the second man?

THE WITNESS: The second man, sir.

THE COURT: The first man is Mr. Bruvold, the lawyer.

Just a moment, if you people all want to stay, you have to be quiet.

BY MR. CUDD:

Q. Now, did you have a conversation with Mr. Gutnecht at this time with reference to processing for induction? A. Yes, sir, I did.

Q. And who was present besides yourself, if anyone? A. Sir, when I first joined up with Mr. Gutnecht, it was at one of the offices where we pass out the induction paper work, and then Mr. Gutnecht indicated to me that he had no intentions to process in any way, such as physical examination or mental.

Q. All right. Now, after he told you that, what did you do, if anything? A. Sir, I escorted Mr. Gutnecht down to Lieutenant Petrie's office.

Q. And what happened there? A. I informed Lieutenant Petrie that Mr. Gutnecht has refused to process either in his physical examination or mental testing.

Q. And did Lieutenant Petrie at that time have a conversation with Mr. Gutnecht? A. Yes, sir. He did.

[24] Q. And who else was present besides Mr. Gutnecht, Lieutenant Petrie and yourself? A. At this time there was only the three of us.

Q. And what conversation—or relate to the Court that conversation that Lieutenant Petrie had with David Gutnecht?

MR. BRUVOLD: I want to object to this at the present time as going—

THE COURT: Maybe you want to stand up when you make your objections.

MR. BRUVOLD: All right. As going beyond the question in the indictment. This witness has established the fact

that Mr. Gutnecht was at the station, at the induction center there and the indictment charges him with failing to be there. I don't think any conversations would be material under the indictment, and I think the charge is limited to that point.

THE COURT: I will receive the testimony subject to your objection. Go ahead, counsel.

BY MR. CUDD:

Q. Would you then relate that conversation that Lieutenant Petrie had with David Gutnecht? A. The conversation went as such: that Lieutenant Petrie informed Mr. Gutnecht of the regulations pertaining to [25] refusal to process for induction.

Q. And did you hear whether he gave him any advice as to the penalties that might ensue? A. Yes, sir.

Q. What did he tell him? A. He informed Mr. Gutnecht that by refusing to be inducted into the service, it could possibly lead to a thousand dollar fine or five years in the penitentiary or both.

(Government Exhibit 2 marked for identification.)

BY MR. CUDD:

Q. Showing you, Sergeant O'Neil, Government Exhibit 2 for identification, I will ask you if you recognize that document? A. Yes, sir. I do.

Q. And where did you first see Government Exhibit 2 for identification? A. This was presented to Lieutenant Petrie in the office.

Q. And presented to Lieutenant Petrie by whom? A. By Mr. David Gutnecht.

Q. Now, on the lower right-hand corner, do you recognize the signature there? A. Yes, sir. I do.

[26] Q. And whose signature is that? A. David Gutnecht's.

MR. BRUVOLD: I am going to object to that as no foundation laid for the identification of the signature and use of the document not in evidence.

THE COURT: I don't think I can hear you. I think if you would stand up. Now I can hear you.

MR. BRUVOLD: I am going to object to the question there, using a document not in evidence and no foundation for the question of the identification of the signatures.

THE COURT: Maybe you want to offer it?

MR. CUDD: Well, Your Honor, I think he misunderstood my question, and I am in the process of laying the foundation. So I will strike the question and move that the answer be also stricken.

THE COURT: It may be stricken.

BY MR. CUDD:

Q. In the very lower right-hand corner, Sergeant, there is a signature, do you recognize that signature? A. Yes, sir. That is my signature.

Q. And it contains your rank and serial number, is [27] that correct? A. Yes, sir. That is correct.

Q. And in the very lower left-hand corner there is another signature. Do you recognize that? A. Yes, sir. That signature is Larry J. Petrie.

MR. BRUVOLD: Your Honor, I move that that be stricken, no foundation for that testimony.

THE COURT: The answer may stand. Next question.

BY MR. CUDD:

Q. Did Lieutenant Petrie sign that, affix his signature to Government Exhibit 2 for identification in your presence? A. Yes, sir. He did.

Q. And you affixed your signature in your presence? A. That is correct, sir.

Q. Now, immediately above the two signatures on Government's Exhibit 2 for identification which you have just testified to, there is some handwriting and a signature there. Do you know how that handwriting got on Government Exhibit 2 for identification? A. Yes, sir. I witnessed David Gutnecht putting this signature there and the statement.

Q. All right. Now, immediately above that there is another signature David Gutnecht, was that placed on [28] Government Exhibit 2 for identification in your presence? A. No, sir. That was signed prior to his giving it to Lieutenant Petrie.

Q. All right.

MR. CUDD: At this time, Your Honor, the Government will offer in evidence Government's Exhibit 2 for identification.

(Government Exhibit 2 offered in evidence.)

MR. BRUVOLD: May I inquire of Government counsel if this is the original of the item that appears in Item 7 of the Selective Service file at page 34?

MR. CUDD: Yes.

MR. BRUVOLD: Then this is already in evidence as a part of the Selective Service file?

MR. CUDD: It is, but I thought I should offer it as a separate exhibit, Your Honor.

THE COURT: Absent objection it may be received.

MR. BRUVOLD: I have no objection then, we have admitted the other.

(Government Exhibit 2 received in evidence.)

[29] BY MR. CUDD:

Q. Now, the sentence and the signature which appears approximately one-third up from the bottom of Government Exhibit 2, to which you have previously testified that Mr. Gutnecht wrote and signed states what, Sergeant?

MR. BRUVOLD: I object to the question, the document will speak for itself.

THE COURT: You may read it. You may tell us.

THE WITNESS: The sentence states, "I refuse to take part in any or all of the prescribed processing. David Gutnecht."

MR. CUDD: I have no further questions, Your Honor.

#### CROSS EXAMINATION

BY MR. BRUVOLD:

Q. Sergeant O'Neil, have you told us all of the conversations that took place at that time between yourself and

Lieutenant Petrie and David Gutnecht? A. Sir, as far as I can remember, yes.

Q. How large was this room that you were in? A. Nine by twelve approximately. You are talking about the room where three of us were together?

Q. Where the three of you were together. [30] A. Right. Approximately nine by twelve.

Q. Nine feet by twelve feet? A. Yes, sir.

Q. Were there some desks or chairs in this room? A. Yes, sir. There is one desk, one davenport, a couple chairs.

Q. Now, one of your functions at the induction center there is to induct the draftees into the military service, is it not? A. Yes, sir. That is correct.

Q. And the Army has certain prescribed regulations for this, do they not? A. Yes, sir. That is correct.

Q. And are you familiar with those regulations? A. Most of them, sir.

Q. You are familiar with the regulations pertaining to induction? A. Most of it, sir.

Q. Showing you an item numbered 27 in Government Exhibit 1, I believe you testified that you recognized Lieutenant Petrie's signature on a document, did you not? [31] A. Yes, sir.

Q. And on that first part of that item 27, on the second page there, page 33 in the listing, there appears a signature, does there not, Larry J. Petrie? A. Yes, sir.

Q. Would that appear to be his signature? A. Yes, sir.

Q. And have you seen that letter before? A. Yes. I have read it.

Q. You have read it? A. Yes, sir.

Q. And that contains a resume of what transpired at the induction station there? A. Yes, sir.

Q. And that is an accurate resume of it? A. Yes, sir.

Q. You are familiar with Army Regulation 601-270? A. Slightly, sir.

Q. Slightly. Would you be familiar with Section 37 of that if I showed you a copy of it?

MR. CUDD: Your Honor, I will object to this question, the regulation, I think, speaks for itself. It's part of the Code of Federal Regulations [32] with which the Court can take judicial notice.

THE COURT: You may answer the question.

THE WITNESS: The question is am I familiar with this?

BY MR. BRUVOLD:

Q. Are you familiar? A. With the oath of allegiance?

Q. Paragraph 737 of Army Regulation 601-270? A. Paragraph 37 in this oath of allegiance?

Q. The procedure prescribed under Section 37 entitled, "Induction"? A. Yes, sir. I am familiar with the regulation.

Q. And that sets out the regulation in regard to the inducting of persons into the military forces, does it not? A. Yes, sir.

MR. BRUVOLD: I will have the reporter mark a copy of this as Defendant's Exhibit A so I don't have to take it out of the book there.

(Defendant's Exhibit A marked for identification.)

BY MR. BRUVOLD:

Q. Showing you Defendant's Exhibit A so we have no question about it, that appears to be a copy of that page, a [33] duplicate copy of that page? A. Yes, sir. That is.

Q. The one you were just reading? A. Right.

Q. Are you familiar with paragraph 40 of Army Regulation 601-270? You may refresh yourself out of the copies there, particularly with reference to the first paragraph and then paragraph C?

MR. CUDD: Your Honor, the Government will object on the grounds that Army Regulation just cited is irrelevant and immaterial. However, if the Court overrules the

objection, we will stipulate as to the admissibility of the regulation.

THE COURT: Yes. It may be received then. Next question, counsel.

(Defendant's Exhibit A offered and received in evidence.)

BY MR. BRUVOLD:

Q. Just for the record then, so we have it, the next item in the stapled item Defendant's Exhibit A here is a duplicate copy, is it not, appears to be a duplicate copy of Section 40? A. Yes, sir. That's correct.

Q. And that goes on to the next page over here covering [34] Section 40? A. That's right.

Q. And then the last sheet on there is the next sheet under the Section 40? A. Yes. Very same.

MR. BRUVOLD: So then it's stipulated Defendant's Exhibit A may be offered in evidence as a copy of those regulations?

MR. CUDD: Subject to my objection as to materiality and relevancy that's correct, Your Honor.

THE COURT: I will overrule the objection and it may be received. Do you have an extra copy?

MR. BRUVOLD: I have a copy here that the clerk can keep. I have my own copy.

BY MR. BRUVOLD:

Q. Now, Mr.—or Sergeant O'Neil, pardon me—Did Mr. — the defendant Mr. Gutnecht ever appear with the group that was there that morning and was he ever offered as a part of the group that was there on the morning of the 24th, the prescribed induction ceremony and proceedings as outlined under paragraph 37 of Army Regulation 601-270?

[35] Mr. CUDD: Well, Your Honor, to shorten up the matter, we will stipulate he wasn't given the opportunity to take the one step forward, object that the evidence is irrelevant and immaterial.

THE COURT: The stipulation may stand. Next question.

BY MR. BRUVOLD:

Q. Now, when Mr. Gutnecht was in this room with Lieutenant Petrie and yourself, was the statement read to him by you or Lieutenant Petrie, "You are about to be inducted into the armed forces of the United States in the Army, the Navy, the Air Force or the Marine Corps as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the armed forces indicated," was this read to him in the room by yourself or Lieutenant Petrie? A. No, sir. That's the last part of the swearing in when a man is inducted into the service. That is done after he has already taken his physical and mental tests, and since he did not accept to take either test this was not read to him.

Q. Paragraph 40 of Army Regulation 601-270, subsection C— A. Paragraph what?

[36] Q. Oh, 14 here is entitled, "Registrants who refuse to submit to induction," is it not? A. Yes, sir. That's correct.

Q. And that would be the regulation that would be applicable in this situation, would it not?

MR. CUDD: I object to that question, Your Honor, as calling for a legal conclusion of the witness.

THE COURT: Sustained.

BY MR. BRUVOLD:

Q. How long have you been at the induction station down there Sergeant O'Neil, in your present capacity or in the capacity you had in January? A. Sir, I have been at the Army exam station for one year and two months.

Q. And what you did in this situation was just follow the practice that you had followed on other occasions on refusals of induction?

MR. CUDD: I object to the question, Your Honor, as being irrelevant, immaterial. He testified as to what he did and what was said on this occasion.

THE COURT: You may answer.

THE WITNESS: Very same procedure, yes.

[37] MR. BRUVOLD: I have no further questions.

MR. CUDD: No further questions, Your Honor.

THE COURT: You may step down, Sergeant. Next witness.

(Witness excused.)

MR. CUDD: Lieutenant Petrie.

[38] Whereupon,

LARRY J. PETRIE,

a witness called by and on behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUDD:

Q. Lieutenant, would you state your name, rank and serial number and present duty station for the record, please?

A. Larry James Petrie, Second Lieutenant, United States Army, Serial number 05341626.

Q. Would you please go a little slower for the court reporter who has to record those numbers. Now, Lieutenant Petrie, were you on duty January 24, 1968? A. Yes, sir, I was.

Q. On that occasion, or that day, did you have a conversation with David Gutnecht? A. Yes, sir.

Q. Do you see Mr. Gutnecht in the courtroom? A. Yes, sir.

Q. And would you indicate him, please? A. The second man at the table there.

Q. The one in the green sweater? A. Yes, sir.

[39] MR. CUDD: May the record show, Your Honor, the witness has indicated the defendant David Gutnecht?

MR. BRUVOLD: No objection, Your Honor. We stipulated to it.

BY MR. CUDD:

Q. Now, did you have occasion to have a conversation with Mr. Gutnecht on January 24, 1968. A. Yes, sir.

Q. Who was present at that conversation besides yourself? A. Sergeant O'Neil.

Q. And where did that conversation take place? A. In my office.

Q. And at the induction station? A. On the armed forces examination and entrance station, commonly shortened to induction station.

Q. Who was present besides yourself? A. Sergeant O'Neill and Mr. David Gutnecht.

Q. All right. What did Mr. Gutnecht say to you at that time if anything? A. That he was refusing to cooperate with the Selective Service System by taking tests, physical and mental, for the draft, or words to that effect. That's definitely not an [40] exact quote.

Q. Is that your best recollection of the conversation? A. There was more to it than that that was said, but that is basically what it boiled down to.

Q. At that time did you advise him of any liabilities that he might incur by taking the action that he told you he was going to take? A. Yes, sir. I did.

Q. And what did you advise him? A. That under the Selective Service Act of 1967, refusing to process for induction is a felony. The act may be brought to trial in civil court and if convicted may result in five years imprisonment or \$10,000 fine or both or any combination thereof.

Q. And did you ask him if he understood that? A. Yes, sir.

Q. Showing you Government Exhibit 2, I will ask you if you recognize your signature thereon? A. Yes, sir.

Q. And that's in the lower left-hand corner, is that correct? A. Right, sir.

Q. Now, immediately above there, there is a one-sentence phrase or one sentence and a signature, do you [41] recognize that? A. Yes, sir.

Q. When was that affixed to Government Exhibit 2, if you know? A. That was done in my presence in my office 24 January '68 by Mr. David Gutnecht.

MR. BRUVOLD: Your Honor, I think this is repetitious and it's perfectly agreeable, no question about the statement. This is part of the Selective Service file. I was familiar with it. The Government offered it and I just checked it because I wished to be sure. I think the document speaks for itself.

THE COURT: The answer may stand. Next question.

MR. CUDD: No further questions.

MR. BRUVOLD: I believe Your Honor has the file up there. I will show it to the witness, we can use this one.

#### CROSS EXAMINATION

BY MR. BRUVOLD:

Q. This is a copy of Item 27 in Government Exhibit 1 and there appears a signature here, "J. Petrie," on that, is [42] that your signature? A. It appears to be. Yes, sir.

Q. And that is a true and accurate resume of what transpired at the induction station at that morning? A. Yes, sir.

Q. You are, in the course of your employment at the induction center there, you are familiar with the government induction regulations? A. More or less. Yes, sir.

Q. You are familiar with paragraph 37 of Army Regulation 601-270? A. Quite, sir.

Q. And you are also familiar with paragraph 40 of Army Regulation 601-270 which deals with processing of registrants and special circumstances? A. Quite, sir, depending on, if that is a posted issue or an older regulation.

Q. And particularly paragraph C, registrants who refuse to submit to induction? A. More or less, sir, yes.

Q. How long have you been employed down there at the induction center? A. I reported in 24 July, '67, sir.

Q. So that's about, last January is about six months [43] then? A. Roughly, sir.

Q. Now, did you state to Mr. Gutnecht or hear stated to him at the induction station, "You are about to be inducted into the armed forces of the United States in the Army, the Navy, the Air Force or the Marine Corps as indi-

cated by the service" announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the armed forces indicated"?

MR. CUDD: Your Honor, I will object to the question on the grounds that it's irrelevant and immaterial on the issue in this case.

THE COURT: You may answer.

THE WITNESS: Can you give me the question for me? Did I say it or hear it said?

BY MR. BRUVOLD:

Q. That's right. Did you say this or hear it said to Mr. Gutnecht? A. No.

MR. BRUVOLD: No further questions, Your Honor.

MR. CUDD: No further questions, Your Honor.

THE COURT: You may step down. All right.

(Witness excused.)

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**Opinion of the United States District Court  
for the District of Minnesota**

UNITED STATES DISTRICT COURT

D. Minnesota,  
Third Division.  
May 9, 1968.

4-68-Cr-22.

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

DAVID EARL GUTKNECHT,

*Defendant.*

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MEMORANDUM  
&  
FINDINGS OF FACT

DEVITT, *Chief Judge:*

In this jury-waived criminal case charging the defendant with violation of the Selective Service Law, the issue as created by the indictment and the defendant's plea of not guilty is whether the government has proved the defendant guilty beyond a reasonable doubt.

The defendant is a 21-year-old resident of Winthrop, Minnesota, and is charged under 50 App., United States Code, § 462 with wilfully and knowingly failing and neglecting to comply with an order of his local Selective Service Board to report for and submit to induction into the armed forces of the United States.

The record shows that the defendant completed and filed the required classification questionnaire (SSS Form No.

100) on January 17, 1966 and was assigned Selective Service No. 21-115-47-162. His draft board, Sibley County, Minnesota Board No. 115, classified him 1-A on February 15, 1966, 2-S on March 15, 1966, and again 2-S on December 21, 1966. The expiration date of the last 2-S classification was October 1, 1967.

On November 23, 1966 the defendant signed and filed a conscientious objection form (SSS Form No. 150). On June 16, 1967 the local board notified the defendant to appear before it on June 21, 1967, at which time the Board would consider his reclassification. On June 21, 1967 he was reclassified 1-A and officially notified of that fact.

The defendant appealed this classification to the State Appeal Board, which, on November 1, 1967, classified him 1-A by a vote of 5 "yes" and 0 "no." The defendant was notified of this action.

On December 20, 1967 Local Board No. 115 declared the defendant delinquent for failure to have in his possession Selective Service Registration card (SSS Form No. 2) and Notice of Classification (SSS Form No. 110). He was advised of this declaration of delinquency on December 21, 1967.

An order to report for induction was mailed to defendant on December 26, 1967, directing him to report for induction at the courthouse at Gaylord, Minnesota, on January 24, 1968 at 6 A.M. He did so report and was transported to the armed forces induction station at Minneapolis, Minnesota.

Upon arrival there the defendant advised Sergeant First Class Billy O'Neil that he would not take part in any induction processing. He was then escorted to the office of the Assistant Processing Officer, Lt. Larry J. Petrie. Petrie advised him that a refusal to process constituted a felony punishable by imprisonment for not more than 5 years

and/or a fine of not more than \$10,000 or both. Defendant advised Petrie that he was aware of the penalty for refusing to process. Defendant then presented to the processing officer a prepared statement containing his reasons for refusal to process for induction.<sup>1</sup> At that time he wrote on the

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<sup>1</sup> The defendant said " \* \* \* the Draft and Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. \* \* \*" His complete statement reads:

"To my fellow Americans. Today I am refusing to be inducted into the United States armed forces. This is a result of my decision last fall to return my draft cards and refuse further cooperation with the Selective Service System.

"Conscription seems to me fundamentally authoritarian and anti-democratic. Its coercive attempts to control the lives of young American men are socially disastrous and humanly outrageous. Primarily, the draft functions to supply the manpower necessary for those few holding real political and military power in this country to continue to commit crimes against humanity in waging a cruel and senseless war in Southeast Asia. Both the Draft and the Vietnam war seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. Those who feel that my decision is 'idealistic' and 'impractical' make the mistake of assuming that there can be a real division between morality and politics. Those people who are called 'realists' and compromise on the most crucial of issues, and those who are silent, are furthering the present disastrous course of this country.

"But we are none of us innocent. I am simply asking that each of you examine your thoughts and your actions. As for myself, I shall probably be in prison before too long, and out again after a few years. This is a small price to pay compared to what so many, many American men and Vietnamese men, women, and children have to pay. To those in the military, I ask that you consider resigning or obtaining a discharge. To my fellow young men, in particular, I ask that you find some alternative—any alternative—to military service.

"Many of you will disagree with me; I respect your position, and only ask that you reconsider. Many will agree; I hope that you do as much as you are capable of doing. We have so little time.

/s/ DAVE GUTKNECHT  
"Dave Gutknecht  
January 24, 1968"

statement, "I refuse to take part, or all, (sic) of the prescribed processing," and signed his name.

It was not contended at trial that the defendant's classification was improper. There is a basis in the record for the 1-A classification made by Local Board No. 115.

The essential elements required to be proved by the government are (1) that a lawful order to report for induction on January 24, 1968 was issued by Local Board No. 115; (2) that the defendant refused to obey the order to report for, and submit to, induction; and (3) that the defendant acted wilfully, unlawfully and knowingly.

There is no dispute as to the facts, but the defense offered by the defendant is that (1) the defendant actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony prescribed by the pertinent regulations, and until such formal ceremony is afforded him he has not refused induction; and (2) the induction order, while apparently based on non-possession of classification and registration cards, was in fact directed at his anti-Vietnam activities and thus violated his right to free speech.

The defendant urges, in connection with his first defense, that an order to report for induction does not include the duty to submit to induction without proof that the defendant was offered the opportunity to participate in a formal induction ceremony. The defendant urges that regulations AR 601-270, Par. 37 and AR 601-270, Par. 40(c) require that a potential inductee into the armed forces must be afforded an opportunity to take "one step forward" as a signal of his departure from civilian, and entry into military discipline, and that this formal induction ceremony was not afforded the defendant. The defendant urges that a making of the statement,

"You are about to be inducted into the armed forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called, and such step will constitute your induction into the armed forces indicated,"

was a condition precedent to induction, but that procedure was not followed.

There is no dispute in the record that such was not done, and it appears that the reason is that the "step forward" procedure under the regulations is only to be taken *after* the inductees are given mental and physical tests in order to determine their eligibility for service in the armed forces. This defendant refused to take the physical or mental tests or participate in any other procedure incident to induction.

[1, 2] Here the defendant is not being charged with failure to take "one step forward," but with failure to comply with the Board's order to report for, and submit to, induction. It is clear from the regulations that an order of a draft board to report for induction also encompasses an order to *submit* to induction. 32 C.F.R. § 1632.14, a part of the Selective Service Regulations promulgated by the President under authority of the statute, provides that it is the duty of the registrant upon receiving an order to report for induction to (a) report for induction at the time and place fixed in such order, and (b) to submit to such induction.

This regulation was initially adopted by Executive Order 10001, 13 F.R. 5488, September 21, 1948, amended by Executive Order 10659, 21 F.R. 1103, February 17, 1956,

and by Executive Order 10984, 27 F.R. 200, January 9, 1962.

The Congress of the United States has specifically authorized the President to prescribe these, and other, rules and regulations to carry out the provisions of the Selective Service Act by 50 App. 460(b) (1).

The courts have held that the duty to report for induction contemplates the duty not only to report, but also to submit to induction. *United States v. Collura*, 139 F.2d 345 (2d Cir. 1943). The Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944), said:

"He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. [Citations omitted.] The order of the Local Board to report for induction includes a command to submit to induction. \* \* \*"

Later the Supreme Court in *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), quoted *Billings v. Truesdell*, *supra*, as authority for the proposition that an order to report for induction includes the duty to submit to induction. Two subsequent decisions of the Court of Appeals, Ninth Circuit, are to the same effect. *Williams v. United States*, 203 F.2d 85 (1953); *Bradley v. United States*, 218 F.2d 657 (1954).

The defendant argues that a subsequent Ninth Circuit case, *Chernekoff v. United States*, 219 F.2d 721 (9th Cir. 1955) is contrary. But it will be observed in reading that case that the facts in it are distinguished from those in *Williams* and *Bradley*.

Defendant's counsel admits that this first defense is a "technical" one. In the court's view, it is not a meritorious one.

[3] Defendant's second defense is that the declaration of delinquency and the direction to report for induction were occasioned by his participation in an anti-Vietnam protest meeting and that the induction order based on such activities violates his right to free speech.

It appears from the Selective Service Board file that on October 16, 1967 the defendant did participate in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis, and that during the demonstration he attempted to turn over his Selective Service card and registration card to a Deputy U. S. Marshal who refused to accept them. The defendant then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining his actions.

There is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that defendant's classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war. But on the contrary, it appears that the action of the Selective Service Board was based on the defendant's violation of the regulations that he have the required draft cards in his possession at all times. 32 C.F.R. § 1617.1, 32 C.F.R. § 1623.5. It is not disputed that this defendant did not have his registration certificate (SSS Form No. 2) and his valid notice of classification (SSS Form No. 110) in his possession at all times.

In such circumstances the Selective Service Board was authorized to declare the defendant delinquent and to order

him to report for induction. 32 C.F.R. §§ 1602.4, 1642.4, 1631.7.

[4] But the defendant contends, nevertheless, that the discarding of his draft cards was symbolic conduct in protest to the Vietnam war, and that such conduct is protected by the First Amendment to the United States Constitution. The United States Supreme Court has not passed on that exact question, but two Courts of Appeal have. *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966); *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967). In *O'Brien* the court upheld the constitutionality of the regulations authorizing a Selective Service Board to declare delinquent, and order the induction of, persons found to be without possession of the required Selective Service cards, and in *Miller* the court upheld the constitutionality of Section 462(b) (3) which punishes the knowing destruction of draft cards. It is expected that the Supreme Court of the United States may soon pass on the constitutionality of a recently enacted Act making it a crime for a person to burn his draft card. That is a separate crime and not charged here.

Reference was made in the trial to a certain Local Board memorandum issued by National Selective Service System Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations. The evidence in the record clearly shows that this defendant was declared delinquent and ordered to report for induction, not by authority of the so-called Hershey memorandum, but because of the defendant's non-possession of the required Selective Service cards in violation of the regulations.

[5] The Court has fully considered the exhibits, the testimony of the witnesses and has judged their credibility. The defendant is clothed with the presumption of innocence and his guilt must be proved beyond a reasonable doubt.

[6] In my view the United States has proved beyond a reasonable doubt every essential element of the crime charged in the indictment and the Court finds the defendant guilty of the crime charged in the indictment. The foregoing expression is intended to comply with Rule 23 of the Federal Rules of Criminal Procedure.

The Probation Officer is directed to prepare a pre-sentence investigation report.

**Opinion of the United States Court of Appeals  
for the Eighth Circuit**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No. 19,407

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

DAVID EARL GUTKNECHT,

*Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA

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[January 20, 1969.]

Before:

MATTHES, GIBSON and LAY,

*Circuit Judges.*

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LAY, *Circuit Judge.*

Defendant appeals his jury-waived conviction of violation of the Selective Service Law. On June 21, 1967, defendant was classified 1-A by his local draft board after a review of his claimed status as a conscientious objector. Defendant appealed to his state appeal board which, on

November 1, 1967, approved his 1-A classification. On December 20, 1967, his local board declared him delinquent for failure to have in his possession his registration card and classification card. He was ordered to report for induction into the Armed Services on January 24, 1968. On that date he reported to his place of induction but advised army officials he would not take part in any induction processing, including the preliminary physical examination. Defendant was then properly warned of the penalty and at that time gave to the army officers a prepared statement which said in part: ". . . the Draft and Vietnam War seem to me indefensible. The laws of the Selective Service System are not worthy of obedience. . . ."

The full text of the district court's well-reasoned opinion is found in 283 F.Supp. 945. We affirm. Defendant, relying upon *Chernekoff v. United States*, 219 F.2d 721 (9 Cir. 1955), asserts that the letter of the law was not carried out in that he actually did report for induction but was not afforded the opportunity to go through the regular formal induction ceremony. The defendant additionally complains that the indictment was "duplicitous" in that it stated two different offenses in one count, to-wit, failure to report and failure to submit to induction. Defendant urges that the phraseology of the indictment requires the government to prove *both* charges beyond a reasonable doubt or fail to convict.

As the district court relates, the United States Supreme Court in *Billings v. Truesdell*, 321 U.S. 542, 557 (1944) has answered these arguments:

"It must be remembered that §11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.'

He who reports to the induction station but refuses to be inducted violates §11 of the Act as clearly as one who refuses to report at all [cite omitted]. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express."

On October 16, 1967, defendant participated in a "Stop-the-Draft-Week" demonstration in Minneapolis. He dropped his Selective Service registration card as well as his classification card at the Deputy United States Marshal's feet. He attached with them a mimeograph explanation of his action. On December 20, 1967, the defendant was declared delinquent by his local board for failure to have possession of his registration card and his notice of classification. Immediately thereafter defendant was ordered to report for induction on January 24, 1968.

Defendant now claims that he was being unlawfully punished for his political views on the Vietnam War and states that the board's punitive action was in violation of his First Amendment rights. The district court, however, found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views. The district court found that the delinquency order was based upon the defendant's violation of the regulation that he have the required cards in his possession at all times. 32 C.F.R. §§ 1617.1 and 1623.5. The district court found that the delinquency order and the order for induction were therefore authorized under 32 C.F.R. §§ 1602.4, 1642.4 and 1631.7.

By placing his draft certificates beyond "continuing availability," Gutknecht "wilfully frustrated [a] governmental interest." It is now settled that such frustration was

"non-communicative" and is not protected by First Amendment principles. *United States v. O'Brien*, 391 U.S. 367 (1968).

Moreover, we are not confronted with an illegal reclassification which revokes a statutory exemption, as in *Oestreich v. Selective Service System Local Board No. 11*, 37 U.S.L.W. 4053 (U.S. Sup. Ct. 1968). Although found delinquent by the local board on December 20, 1967, the order of delinquency did not relate to a reclassification. Defendant had been classified 1-A since June 21, 1967. Defendant makes no claim upon appeal that his 1-A classification was not based on evidence or that he was denied fair administrative procedures in regard to his classification. Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to "delinquents." The regulations (32 C.F.R. § 1631.7) specify the order of induction based upon a specified priority of status of all persons having 1-A or 1-A-O status. This priority is administratively created. We know of no legal reason why the order of call cannot be administratively altered as long as it is done "impartially" without discrimination. Congress has authorized:

"The selection of persons for training and service . . . shall be made in an *impartial manner*, under such *rules and regulations as the President may prescribe*, from the persons who are liable for such training and service and who at the time of selection are registered and classified, *but not deferred or exempted . . .*"  
(Emphasis ours.) Tit. 50 U.S.C. § 455(a)(1).

We emphasize we are not confronted here with a reclassification which has no basis in fact or which attempts to

deprive the defendant of any existing statutory exemption or deferment.

The board is given certain administrative discretion in carrying out congressional policy. This discretion should be upheld as long as it is reasonably related to a governmental interest and is not otherwise exercised unlawfully. In the instant case the board's regulation concerning possession of the registration card is a reasonable one and related to government interests. See *United States v. O'Brien, supra*. The board's self-promulgated definition of "delinquency" is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute. It is only "that use of delinquency" which is proscribed by the *Oestereich* case. Here the defendant does not claim any kind of deferment, let alone exemption. Involved here is the order of call for induction of those already classified 1-A. Since the order of call is governed by regulation (1631.7) reasonable conditions may be administratively attached to it. Although a local board may not arbitrarily or discriminatorily abuse the order of call,<sup>1</sup> if it is reasonably and impartially administered there can exist no legal fault in its administrative handling.

To establish irregularity in the board's findings of "delinquency," the adjudicated effect of the board's action becomes the relevant test. Here the defendant is not deprived of either statutory exemption or deferment; here the board gave notice to him that he was delinquent under its regulations for failure to have his certificate; here he was given a reasonable period to correct this delinquency; here he had statutory notice that he was subject to be drafted ahead of those in the "prime age group." Defen-

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<sup>1</sup> Cf. *United States v. Lybrand*, 279 F.Supp. 74 (E.D. N.Y. 1967).

dant's right to be called in order was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws. The evidence is clear that defendant violated these laws. Under these circumstances induction of the defendant was not lawless or irregular.

Judgment affirmed.

STATE HEADQUARTERS  
SELECTIVE SERVICE SYSTEM

100 East Tenth Street  
Saint Paul, Minnesota 55101

17 October 1967

REGISTERED MAIL

Mr. George Hollingsworth  
Special Agent, FBI  
392 New United States Courthouse  
Minneapolis, Minnesota 55401

Dear Mr. Hollingsworth:

In accordance with your request of this date enclosed are three Notices of Classification (SSS Form 110) and one Registration Certificate (SSS Form 2) for the following:

David M. Ponce	(SSS Form 110)
21-51-46-765	
David Earl Gutknecht	(SSS Form 2)
21-115-47-162	(SSS Form 110)
Terry Zane Munn	(SSS Form 110)
41-31-44-1035	

Sincerely yours,

EDWARD P. BARROWS  
Colonel, JAGC  
Deputy State Director

EPB:ss

Enclosures: 4

cc: Col. Knight

19 October 1967

Mr. George Hollingsworth  
Special Agent, FBI  
392 New United States Courthouse  
Minneapolis, Minnesota 55401

Re: Gutknecht, David Earl  
SSN 21-115-47-162

Dear Mr. Hollingsworth:

This letter is to supplement previous correspondence and to inform you that David Earl Gutknecht is registered with Selective Service Local Board No. 115, Sibley County, Gaylord, Minnesota. This registration was accomplished on 20 December 1965.

David Gutknecht's date of birth is 9 December 1947. He has filed SSS Form 150, a special form for conscientious objectors, with the local board. His file is currently before the Minnesota Appeal Board for adjudication.

Enclosed for your use is a copy of a letter dated 16 October 1967 from the Hennepin County Selective Service Chief Clerk, Mr. Merrill J. McCabe

Sincerely yours,

EDWARD P. BARROWS  
Colonel, JAGC  
Deputy State Director

Enclosure  
EPB/mka  
cc: U. S. Attorney  
Colonel Knight

Colonel Knight  
John Roberts, SA

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## UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION  
392 Federal Building U. S. Court House  
110 South Fourth Street  
Minneapolis, Minnesota 55401

October 24, 1967

In Reply, Please Refer to  
File No. 25-10726

Edward P. Barrows  
Colonel, JAGC  
Deputy State Director  
Selective Service System  
100 East Tenth Street  
St. Paul, Minnesota 55101

Dear Colonel Barrows:

Re: Gutknecht, David Earl  
Selective Service Number  
21-115-47-162

Reference is made to your letter dated October 19, 1967 with an enclosure of a letter dated October 16, 1967 from Mr. Merrill J. McCabe which sets forth that Gutknecht's file is currently before the Minnesota Appeal Board for adjudication.

This office is currently conducting an investigation relative to Gutknecht dropping his draft card at the Federal Office Building on the morning of October 16, 1967.

It would be greatly appreciated if Gutknecht's Selective Service file could be reviewed, and Special Agent George Hollingsworth of this office will appear at your headquarters October 25, 1967.

Very truly yours,

/s/ Richard G. Held  
Special Agent in Charge

## UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY  
DISTRICT OF MINNESOTA  
596 U.S. COURTHOUSE  
MINNEAPOLIS, MINNESOTA 55401

Address Reply to  
United States Attorney  
and Refer to  
Initials and Numbers  
JEC:dmp

November 16, 1967

Colonel Edward P. Barrows  
Deputy State Director  
Selective Service System  
100 East Tenth Street  
St. Paul, Minnesota 55101

Re: David Earl Gutknecht  
Selective Service Number  
21-115-47-162

Dear Colonel Barrows:

On October 16, 1967, the above-captioned individual participated in a demonstration at the Federal Office Building, Minneapolis, Minnesota, in connection with "Stop the Draft Week."

During the demonstration, he attempted to turn over his Selective Service card and registration card to a deputy United States Marshal who refused to accept them. He then dropped both cards at the deputy's feet together with mimeographed literature explaining his actions.

In the mimeographed literature dropped by Gutknecht he stated that his application for classification as a conscientious objector was to be destroyed.

An agent of the Federal Bureau of Investigation attempted to interview Gutknecht at the Twin Cities Information Cen-

ter, 1822 Fourth Avenue South, Minneapolis. He, however, refused to sign the Waiver of Rights form and refused to make any statement.

The above information is furnished your office for your consideration in the light of Selective Service regulations. Would you please advise us of any action taken by you in the matter so that we will be able to make a prosecutive decision on the above-captioned individual's failure to possess a certificate of registration and a valid notice of classification.

Very truly yours,

/s/ **PATRICK J. FOLEY**  
United States Attorney

By: **J. EARL CUDD, Assistant**  
United States Attorney

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## SELECTIVE SERVICE SYSTEM

Approval  
Not Required

## DELINQUENCY NOTICE



(23)

**LOCAL BOARD NO. 115**  
 Sibley County  
 Court House  
 Gaylord, Minnesota

(Local Board Stamp)

Dec. 20, 1967

(Date Declared Delinquent)

Dec. 21, 1967

(Date of Mailing)

To David Marl Gutknecht  
 (First) (Middle) (Last)

SELECTIVE SERVICE NO.			
21	115	47	162

Address 524 12th Ave. S.E.  
 (Street and Number or P.O. Box)

Minneapolis, Minn. 55414

(City, Town, or Village)

(County)

(State)

(ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform following duty or duties required of you under the selective service law. For failure to comply with 1617.1 and 1623.5, of the Selective Service regulations which requires every registrant to have in his possession at all times a Selective Service Registration Card, SSS Form No.2 and Notice of Classification, SSS Form No.110, which has been issued to him by his local board.

Valid evidence has been submitted to his local board which sets forth the facts that you have not, at all times and do not now have in your possession a Registration Certificate, SSS Form No.2 and Notice of Classification, SSS Form No.110, issued to you by this local board.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as \$10,000, or by both such fine and imprisonment. You may be classified in class I-A as a delinquent and ordered to report for induction.

James F. Kuehne  
 (Member or Chair of Local Board)

## INSTRUCTIONS

A Delinquency Notice (SSS Form 304) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

Supreme Court of the United States

No. 1176 ----, October Term, 19 68

David Earl Gutknecht.

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed April 26 ----, 19 69

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 1144.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.